IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-138.

DELTA COMMUNICATIONS CORPORATION,
Petitioner,

v.

NATIONAL BROADCASTING COMPANY, INC.
AMERICAN BROADCASTING COMPANIES, INC.
AND SOUTHERN TELEVISION CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT, NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

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BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 579 F. 2d 972 (Appendix C). Its opinion on rehearing is reported at 590 F. 2d 100 (Appendix E). The opinion of the District Court is reported at 408 F. Supp. 1075 (Appendix A).

JURISDICTION.

The original judgment of the Court of Appeals was entered on September 11, 1978 and modified judgment on rehearing was entered on February 21, 1979. Petitioner's second petition for rehearing was denied on May 7, 1979. The petition for writ of certiorari was received by respondent on August 1, 1979. Petitioner does not state the provision under which it invokes jurisdiction in this Court.

QUESTION PRESENTED.

Whether the Court of Appeals properly upheld the District Court's grant of Respondents' motions for summary judgment where Petitioners' case was based entirely on inferences which were clearly unreasonable in light of the undisputed facts in the record.

STATEMENT OF THE CASE.

National Broadcasting Company, Inc. ("NBC") files this brief in opposition to the petition for writ of certiorari filed by Petitioner Delta Communications Corporation. By its petition Delta challenges the order of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court which granted motions for summary judgment made by NBC and the other defendants.

To provide a statement of this case is complicated by the fact that as the lawsuit has progressed through the courts, Petitioner has proffered a variety of theories, modifying or abandoning each one as it was rejected by the courts, and substituting another in an effort to find one that might be sustained.

The litigation began as a collection suit by American Telephone and Telegraph Company ("AT&T") against Petitioner. Petitioner then counter-claimed against AT&T, attacking AT&T's rates and charges. There is little doubt that Petitioner's claim would have been dismissed on jurisdictional grounds since the AT&T tariff rates are subject to the regulation of the Federal Communications Commission. However, on the eve of the likely dismissal, Petitioner filed a second counter-claim, raising antitrust charges not only against AT&T but against NBC, American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS") and Southern Television Corp. ("Southern" or "WTOK") as well.

Extensive discovery took place over three years in an attempt to ascertain the basis for Petitioner's last-minute antitrust contentions. Nevertheless, Petitioner's claims remained largely vague and unfocused, and where ascertainable at all, appeared to have no merit as a matter of law.

As a result, NBC and the other counter-defendants filed motions for summary judgment which were granted by the District Court. The Court of Appeals affirmed.

In its appeal from the District Court's decision, Petitioner narrowed considerably the basis for its claims. For example, Petitioner had expended much time and effort in the District Court in a futile attempt to show that it had been victimized by a broad-ranging antitrust "conspiracy" in the television industry. This contention was abandoned in the Court of Appeals, where Petitioner devoted much of its brief to a confused attack on AT&T tariffs. Now, in its present petition challenging the decision of the Court of Appeals, Petitioner again attempts to shift position and presents a case radically different from that originally offered below.

Petitioner now also has abandoned the tariff issues which were so strongly emphasized in the Court of Appeals. Further, Petitioner has dropped two defendants, the original defendant AT&T and CBS. NBC, along with ABC, and Southern, however, remain as defendants.

Petitioner's theories concerning NBC nonetheless have undergone considerable alteration. Petitioner had first accused NBC of participating in the broad-ranging broadcasting industry "conspiracy" (including CBS, now dropped), and the broad-ranging telephone tariff "conspiracy" (including not only CBS but AT&T, also now dropped), both of which are now abandoned. Now Petitioner accuses NBC only of a refusal to deal with it, allegedly as a result of a "conspiracy" with two television stations which are affiliated with NBC and are located in neighboring communities, but also serve part of the community in which Petitioner's station operated.

This theory, involving an alleged conspiracy between NBC and two of its affiliates, was likewise altered since it was originally suggested only as a minor point to the District Court. In the District Court, Petitioner claimed that NBC's affiliates in Jackson, Mississippi (WLBT) and in Laurel-Hattiesburg, Mississippi (WDAM) conspired with the station operated by respondent Southern in Meridian, Mississippi (WTOK), where Petitioner was licensed to operate. In the District Court, appellant claimed that this "conspiracy" occurred because the corporations licensed to operate WDAM and WTOK (but not WLBT) had a common stockholder. The District Court's well reasoned opinion dismissed this point as clearly without merit as a matter of law. (408 F. Supp. at 1110-11, app. A-72-74). Subsequently, this claim, like most of Petitioner's other claims, was altered in the hope that reviewing courts might find a modified theory more palatable; the theory now is that NBC conspired with WLBT and WDAM, but *not* with WTOK.

As the District Court's opinion shows, (408 F. Supp. at 1107-111, app. A-65-74), Petitioner originally argued only that any NBC involvement with the neighboring stations was merely a tangential aspect of the alleged "conspiracy" between WTOK and WDAM (the stations having a common shareholder), which purportedly aimed to deprive Petitioner of programming. Petitioner claimed that WDAM was to "pressure" NBC not to provide Delta with NBC programs. The District Court assumed *arguendo* the existence of such "pressure," but concluded that it clearly could not have succeeded because NBC in fact *did provide* Petitioner with programs, affiliation, and compensation.

Thus, although Petitioner now emphasizes a refusal to deal claim against NBC, it does so in the face of *undisputed* facts showing that NBC *did deal* with Petitioner. These undisputed facts, which fully supported the District Court's granting of NBC's motion for summary judgment, are as follows.

Petitioner's station, WHTV, was assigned by the FCC to operate in Meridian, Mississippi as a UHF station. The only other station in Meridian was Southern's station, WTOK, which was a VHF station that had been affiliated with the CBS television network since 1953 [1] (Walker 662-63; [2] Wright 30, 408 F. Supp. at 1081, app. A-6). In addition, WDAM (Laurel-Hattiesburg) and WLBT (Jackson), both NBC affiliates, reached about 24% of the Meridian market (Mapes ex. 36, app. 1241-1242; 408 F. Supp. at 1081, app. A-6).

An earlier attempt to operate a UHF station in Meridian had failed (Walker 662-63, app. 609-610; 408 F. Supp. at 1081, app. A-5-6). In fact, UHF stations historically had suffered competitive disadvantages because many sets were not equipped to receive UHF stations and because of UHF reception problems (Walker 60-61; Walker ex. 1; Weem ex. 5; 408 F. Supp. at 1080, app. A-5-6).[3] Necessarily this reduced the number of viewers UHF stations could attract.

1. Television stations comprising the NBC, ABC and CBS television networks, with the exception of five stations owned by each network, are independently owned stations that enter into affiliation contracts with the network or networks of their choice. A station can be a primary affiliate of one network (receiving first-call on that network's programs) and at the same time be a secondary affiliate of another network or networks.

2. References are to transcripts of depositions.

3. Although the exact figure cannot be ascertained, it would appear that when WHTV went on the air only between 30 and 40 percent of the nation's televisions sets could receive UHF (408 F. Supp. at 1091, n. 31, app. A-29).

In going on the air, WHTV also was faced with the problem of entering a small market with a limited number of viewers and with little growth potential. Petitioner was warned by its expert and consultant that it likely would go without network affiliation and suffer losses for at least two years (Doherty Report, Walker ex. 1; 408 F. Supp. at 1081, app. A-5). This was so because in the television business, a station is affiliated with and compensated by a network only if it adds sufficient unduplicated television homes to the network circulation to be of value to the network. Television networks operate by selling advertising time on a "lineup" of affiliated stations which broadcast programming provided by the network (C. Jones, 33-42; Mapes, 346-352; 408 F. Supp. at 1083, app. A-10-11). If a station has sufficient ratings (*i.e.*, number of viewers watching), it is paid by a network for carrying network programming and related advertising messages, with the level of payment also based on the station's ratings (C. Jones, 45-51, 96; Walker, 334-336; 408 F. Supp. at 1083, app. A-10-12). The price at which a network is able to sell advertising time also is based on ratings for its "lineup" of stations (C. Jones, 33-42, 45-51, 96; 408 F. Supp. at 1083, app. A-10-12).[4]

Affiliation requires a network to undertake certain costs and burdens, including the need for constant communications with the station, visits by network representatives, and the problem of having a poorly run station reflect

4. Networks also frequently pay the AT&T charges for delivery of programs to local stations whose ratings warrant such payment, although networks generally recoup some of this cost by a provision in the affiliation agreement that provides that stations will not be compensated for carriage of a certain number of hours of network programming (Mercer affidavit, ex. 7; C. Jones 99-100; 408 F. Supp. at 1084, app. A-12).

badly on the network's service (408 F. Supp. at 1092, n. 32, app. A-31). Hence, only where a station meets certain minimum standards is an affiliation economically viable. Otherwise, the affiliation is of no value to a network.

Here, there was absolutely no dispute that the addition of WHTV to a network lineup would not at any time have produced a single additional dollar in income to the network (Mercer Affidavit; 408 F. Supp. at 1092, app. A-31). Yet, although WHTV never was of any economic value to NBC, throughout the station's history NBC nevertheless complied with WHTV's requests.

WHTV began broadcasting on June 8, 1968 (Amended counterclaim of Delta, p. 8; 408 F. Supp. at 1082, app. A-8). Between then and December, 1968, WHTV desired NBC programming solely for the purpose of filling "gaps" in the schedule of the ABC programming that was WHTV's primary objective; during this period, Petitioner's stationery bore the ABC logo (Walker ex. 223, 224, 226, 4, 15; Mercer Affidavit, ex. 2; 408 F. Supp. at 1082, app. A-7). NBC agreed to provide such "fill-in" programming, and within three months of WHTV's sign-on, starting with the Fall 1968 season, WHTV began receiving seven NBC programs (Mercer Affidavit; 408 F. Supp. at 1082, app. A-8).

After Calvin Jones (the first person with broadcasting experience to be involved in the operation of the station) took over in December, 1968, Petitioner for the first time began to direct its efforts toward primary, first call affiliation with NBC (C. Jones, 31-32; Mercer Affidavit ex. 4). By May, 1969, Petitioner was given this first call affiliation by NBC (Mercer Affidavit; 408 F. Supp. at 1082, app. A-8).

Finally, NBC paid station compensation to WHTV commencing in April, 1970 (Mapes, ex. 57; Mercer affidavit; 408 F. Supp. at 1082, app. A-8), even though a station with ratings as poor as WHTV's is not worth the payment of such compensation. NBC's policy was not to pay compensation to a station whose ratings were below the level of 6,000 prime time homes, based on an economic judgment that advertisers would be unwilling to increase their overall payment to NBC for the addition of a station with ratings below the 6,000 figure (Mapes, 145-148; C. Jones, 154; Mercer affidavit; 408 F. Supp. at 1084, app. A-13). WHTV's ratings never exceeded 4,000 homes, and frequently were less than 3,000 (Weems ex. 97; Mercer Affidavit; 408 F. Supp. at 1084-85, A-13-15).[5] Nonetheless, NBC elected to deviate from its policy in Petitioner's favor in order to provide Petitioner with compensation.

In sum, the facts are uncontradicted that although NBC had nothing to gain by providing a single minute of programming to WHTV at any time in its existence, *NBC nonetheless provided WHTV with programs, affiliation and compensation*. On this record, the District Court granted NBC's motion for summary judgment, finding that no "inference" of conspiracy could be found concerning NBC's alleged "refusal to deal" with Petitioner—which, of course, was *not a refusal* at all. The Court of Appeals affirmed by adopting the opinion of the District Court on September 11, 1978, and denied rehearing on February 21, 1979.

5. Although Petitioner now claims that there is a factual question concerning its ratings, this is not the case. The only ratings survey that indicated that Delta had anything but the most paltry audience was, without dispute, shown to be incorrectly computed (408 F. Supp. at 1085, app. A-14-15). Petitioner's attempt, at this late date, to concoct a "factual" dispute based on this survey is wholly without merit.

Argument.

I. THE COURTS BELOW APPLIED THE PROPER STANDARD FOR THE GRANTING OF SUMMARY JUDGMENT.

Petitioner's main point of emphasis in this Court is that both the District Court and the Court of Appeals (which adopted the District Court's opinion) utilized an improper test for the granting of summary judgment. Petitioner argues that the District Court merely chose what it believed to be the "most probable of conflicting inferences" and then granted the motions of NBC and the other defendants. This claim of Petitioner is bottomed on a complete mischaracterization of the District Court's ruling, which actually was based on the determination that Petitioner's purported "inference" was overwhelmed by the undisputed *facts* in the record. As we will discuss below, in its analysis the District Court followed the explicit teachings of this Court in **First Nat'l Bank of Arizona v. Cities Service Co.**, 391 U. S. 253 (1968), and the cases in other circuits which have interpreted the **Cities Service** case.

To place Petitioner's contention in proper context, it is necessary to bear in mind why the question of "inferences" is so important to Petitioner. The reason: it was undisputed that after an extensive three year discovery program, Petitioner was unable to point to one single piece of evidence directly establishing any conspiracy or rebutting the affidavits submitted by Respondents explicitly denying conspiratorial conduct. 408 F. Supp. at 1088, app. A-22. As a result, Petitioner must wholly rely on the alleged circumstantial effect of supposed "inferences" to withstand summary judgment.

Petitioner's current argument is that NBC allegedly refused to deal with Petitioner because of a "conspiracy" with two stations affiliated with NBC and which are located in neighboring communities and which also serve part of the community in which Petitioner's station was operating. However, Petitioner merely points to evidence allegedly showing that these stations indicated to NBC that they would prefer that NBC not affiliate with Petitioner's station. From this, Petitioner contends that an "inference" exists that NBC's alleged "refusal to deal" with Petitioner was the result of a conspiracy. As the District Court properly held, Petitioner's argument fails because undisputed facts showed that (1) the alleged refusal was not a refusal at all; and (2) the supposed inference on which Petitioner relies is wholly unreasonable.

In evaluating Petitioner's conspiracy claim, the District Court assumed *arguendo* for the purpose of summary judgment that pressure not to affiliate with Petitioner was exerted on NBC by its Laurel-Hattiesburg affiliate, WDAM, 408 F. Supp. at 1108, 1110; app. 68, 72.[6] Nonetheless, the Court properly concluded that any supposed "inference" of conspiracy flowing from this assumed "pressure" was wholly overcome by the simple fact that "the efforts of the alleged schemers were a complete failure. . . ." 408 F. Supp. at 1109; app. A-68. The Court reached this conclusion because the undisputed facts established that NBC did *not refuse to deal* with Petitioner. Instead, NBC

6. Because Petitioner's theory in the District Court differed from the one it proffers in the present petition, see p. 4, *supra*, the District Court did not assume (even *arguendo*) pressure from WLBT, NBC's Jackson affiliate, but did note that the facts indicated that WLBT's position appeared no different than WDAM's, 408 F. Supp. at 1111; app. A-73-74, thereby tending to rebut Petitioner's theory of that moment that WTOK and WDAM were conspiring because they had a common shareholder. *See also* Section II(A), *infra*.

provided fill-in programs when Petitioner desired such programs, even while devoting its primary attention to ABC; provided full affiliation shortly after Petitioner's interest turned to NBC; and even paid Petitioner station compensation despite its low ratings. (See pp. 7-8, *supra*).

In short, the District Court properly concluded that it hardly could infer a conspiratorial basis for a refusal to deal when the very fact of refusal was rebutted by undisputed evidence!

Petitioner's suggestion that the District Court merely chose what it viewed as the "more probable" inference thus is plainly wrong. Instead, the District Court found that the "inference" proffered by Petitioner (as the entire basis for its claim) was overwhelmed by the *undisputed facts* in the record. This is exactly the determination mandated by this Court's decision in **First Nat. Bank of Arizona v. Cities Service,** 391 U. S. 253 (1968).

In **Cities Service,** plaintiff, like Petitioner here, claimed that he had been subjected to a conspiratorial boycott but could produce no evidence of such a conspiracy. Instead, again like Petitioner here, plaintiff relied on a single fact from which he claimed a conspiracy should be inferred: the sudden decision of defendant Cities Service to halt negotiations with plaintiff. This Court noted that "given no contrary evidence" this single fact might suffice for plaintiff to reach a jury. 391 U. S. at 277. However, the Court went on to cite the "overwhelming amount" of "contrary evidence," *id.*, and to conclude that "not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative

force of the evidence showing such a failure, but the former inference is more probable." *Id.* at 280.

Exactly the same reasoning, in an even clearer case, was correctly employed by the Courts below here. The District Court noted that in **Cities Service**, where (unlike here) defendant in fact did not deal with plaintiff, it was "only the attractiveness" of plaintiff's offer that even permitted an inference of conspiracy to arise from defendants' refusal to accept. 391 U. S. at 279. Nonetheless, **Cities Service** held that defendants' failure to accept the "attractive bargain" was insufficient to withstand summary judgment. The District Court observed that in the present case, even had NBC not dealt with Petitioner, NBC's right to summary judgment would have been even stronger than that of the plaintiff in **Cities Service** because:

> "the bargain [offered by Petitioner] is demonstrably *unattractive*. The service of delivering a network's signal to Delta's predicted audience was not worth purchasing. . . . [N]o inference of anticompetitive conspiracy would be reasonable from the facts here which show no more than the failure to conclude an unattractive bargain." 408 F. Supp. at 1085; app. A-15 (emphasis added).

Contrary to Petitioner's suggestion that the decision below has created a rule in the Fifth Circuit which is in conflict with that employed elsewhere, the decision in the present case is consistent both with the **Cities Service** opinion and with interpretations of other circuits. Of the nine cases cited by Petitioner (Petition, p. 10 n. 3) in support of the proposition that the present case establishes a rule "unlike that in all other Circuits interpreting **Cities Service**, . . . ," six resulted in *affirmance* of grants of

defendants' summary judgment motions,[7] and the remaining three cases cited by Petitioner have absolutely nothing to do with the question of when a case wholly based on "inference" can withstand a motion for summary judgment. Furthermore, several of the cases relied on by Petitioner not only uphold summary judgment grants but they even utilize reasoning quite similar to that of the courts below here.[8]

In sum, the decision of the Courts below properly followed the standards for summary judgment established by this Court and utilized in other circuits; accordingly, no further review is required.

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7. **Harold Friedman, Inc. v. Kroger Co.**, 581 F. 2d 1068 (3d Cir. 1978); **Freeman v. Decio**, 584 F. 2d 186 (7th Cir. 1978); **Admiral Theatre Corp. v. Douglas Theatre Co.**, 585 F. 2d 877 (8th Cir. 1978); **British Airways Bd. v. Boeing Co.**, 585 F. 2d 946 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1790 (1979); **Craig v. Sun Oil Co.**, 515 F. 2d 221 (10th Cir. 1975); *cert. denied*, 429 U. S. 829 (1976); **Merit Motors, Inc. v. Chrysler Corp.**, 569 F. 2d 666 (D. C. Cir. 1977).

8. In **Freeman v. Decio**, a derivative action, plaintiff claimed that because the ratio of total material costs to total sales revenue declined at a time when the company's raw material prices allegedly were increasing, the reported material costs must have been understated. The inference relied on by plaintiff was rejected by the Court in light of defendant's evidence "leaving the inference to be drawn too weak to effectively controvert the other evidence attesting to the accuracy of the reported statements." 584 F. 2d at 198.

In **Admiral Theatre Corp. v. Douglas Theatre Co.**, the Court, citing **Cities Service**, likewise held that "once a defendant has shown that the facts upon which plaintiff relies are not susceptible to plaintiff's interpretation, summary judgment may be appropriate." 585 F. 2d at 889.

In **British Airways Bd. v. Boeing Co.**, the Court rejected as insufficient evidence of the cause of an air crash the inference that a certain defect "can" lead to an accident such as the one at issue, noting that mere reliance on an "inference" is insufficient; "only those inferences of which the evidence is reasonably susceptible" suffice. 585 F. 2d at 952.

And in **Harold Friedman, Inc. v. Kroger Co.**, the Court rejected plaintiff's reliance on an inference contradicted by the record.

II. PETITIONER'S OTHER CLAIMS ARE WITHOUT MERIT.

Petitioner's other arguments with respect to NBC—that the Courts below improperly justified alleged antitrust violations on the basis of Respondents' economic self interest and that the denial of network television programs somehow creates a hybrid violation of the Sherman Act and the Communications Act—merely are repetitive aspects of petitioner's argument that the courts below applied improper standards for the granting of summary judgment. These contentions are equally without merit.

A. The Self Interest Contention.

The District Court cited the economic self interest of various Respondents in not dealing with Petitioner for a very specific and appropriate purpose—to show that Petitioner's claims of conscious parallelism and inferences of conspiracy were rebutted by undisputed facts.

In the District Court, Petitioner pressed an argument, now abandoned, that there was an industry wide conspiracy to deprive it of programs. Then, in the absence of any evidence of conspiracy, Petitioner was forced to rely on the alleged consciously parallel actions of ABC, CBS, and NBC. In fact, as the District Court noted, the three networks did not even behave in a parallel manner. 408 F. Supp. at 1088; app. A-20. In any event, the District Court noted that a claim based on conscious parallelism must show not only consciously parallel actions but also conduct "contrary to the economic self-interest of the networks." *Id.*, citing **Theater Enterprises, Inc. v. Paramount Film Distributing Corp.**, 346 U. S. 537 (1954). Hence, it was highly relevant that there was undisputed proof that the networks would have been acting in their individual

economic self interest by *not* affiliating Petitioner's station, which was of no value to them.

Petitioner also contends that the District Court's discussion of WLBT's self interest was improper. Here, Petitioner's argument is disingenuous at best.

The question of WLBT's self interest came up in the District Court because Petitioner there made a different claim of conspiracy than it makes here. In the District Court, Petitioner argued that the conspiracy to deprive it of NBC programs was a result of a conspiracy between WDAM (Laurel-Hattiesburg) and Respondent Southern (WTOK), which shared a common stockholder. (See p. 4, *supra.*) WLBT (Jackson), however, did not likewise share a common stockholder. Thus, it must have been acting only out of self interest, according to Petitioner's own theory of that moment, but nonetheless behaved in a manner similar to that of WDAM, an alleged conspirator. The District Court properly found this fact to be inconsistent with Petitioner's "common stockholder" theory of conspiracy.

United States v. General Motors Corp., 384 U. S. 127 (1966), cited by Petitioner, is irrelevant. That case merely held that conspiratorial conduct is not justified by self interest. Here, of course, no conspiratorial conduct was shown.

B. The Communications Act Contention.

Finally, Petitioner argues that certain FCC rules have been violated and an antitrust violation somehow automatically arises therefrom. To begin with, Petitioner cites no support for this unique proposition. In any event, the rule cited, 47 C. F. R. § 73.658(b), prohibits a "contract, arrangement or understanding," which is exactly what Petitioner has been unable to establish.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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